

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

Date of Decision: 8-11-1995.

Criminal Appeal No. 156 of 1989

For Approval and Signature:

THE HON'BLE MR. JUSTICE A.N. DIVECHA

And

THE HON'BLE MR. JUSTICE H.R. SHELAT.

1. Whether Reporters of Local Papers may be allowed to see the Judgment ?
2. To be referred to the Reporter or not ?
3. Whether Their Lordships wish to see the fair copy of Judgment ?
4. Whether this case involves substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder ?
5. Whether it is to be circulated to the Civil Judge?

Mr. A.J. Patel, Advocate for the appellant.

Mr. S.R. Divetia, Additional Public Prosecutor for the State.

Coram: A.N. Divecha, J. & H.R. Shelat, J.  
(8-11-1995)

ORAL JUDGMENT: (Per: H.R. Shelat, J.)

1. The appellant, having been convicted of the offences under Section 66-A of the Bombay Prohibition Act and Section 18 of the Narcotic Drugs and Psychotropic Substances Act, 1985, by the then learned Additional Sessions Judge-Nadiad, in Sessions Case No.156 of 1988 has preferred this appeal.

2. Tersely put and shorn of unnecessary details, the case of the prosecution-respondent is that Mr. M.N. Patel, the Circle Police Sub-Inspector, Dakor with his members of the staff was on patrolling duty. He came to know during patrolling that one person from Rajasthan had gone to Bhagwanji na Muvada with opium and was near the bus stand. The Circle Police Sub-Inspector then

called the panchas and went to the bus stand where, on seeing him and other police personnel that person started to flee but he was caught hold of. On being interrogated he gave his name and other particulars. His search was taken. During the search a cloth-bag was found wherefrom a plastic bag containing 520 grams of opium could be seen. On being questioned that person divulged that he was having no permit to possess the opium. That person was no one else but the appellant. As the police found that offences under Section 66-A of the Bombay Prohibition Act and Section 18 of the Narcotic Drugs and Psychotropic Substances Act were committed, appellant was arrested, and then after undergoing necessary formalities and investigation as per law, the charge-sheet was presented before the Court of the Judicial Magistrate, First Class at Dakor. As the learned Magistrate has no jurisdiction to hear and decide, he committed the case to the Court of Sessions at Nadiad which came to be registered as Sessions Case No. 156 of 1988. The charge was framed and plea was taken. The appellant pleaded not guilty. The prosecution then led necessary evidence. After appreciating the evidence on record, the learned Additional Sessions Judge to whom the case was assigned, convicted the appellant with which he was charged, and sentenced him, for the offence under Section 18 of the Narcotic Drugs and Psychotropic Substances Act, 1985 to 10 years rigorous imprisonment and fine of Rs.1,00,000/- in default to suffer rigorous imprisonment for one year more. No separate sentence was passed with regard to the offence under Section 66-A of the Bombay Prohibition Act. The present appeal is, therefore, filed by the original accused.

3. Mr. Munshi, learned counsel representing the appellant assailed the judgment only on one point submitting that Section 50 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the 'NDPS Act') was a given a go-by. although to follow was incumbent upon the prosecution. Shri S.R. Divetia, learned Additional Public Prosecutor submits at this stage that unless in evidence a suggestion is made on behalf of the defence, Section 50 cannot be interpreted as canvassed by the learned Advocate, Mr. Munshi. Section 50 of the NDPS Act runs as under;

50. "Conditions under which search of persons shall be conducted -

(1) When any officer duly authorised under Section 42 is about to search any person under the provisions of section 41, section 42 or section 43, he shall, if such person so requires, take such person without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in section 42 or to the

nearest Magistrate;

(2) If such requisition is made, the officer may detain the person until he can bring him before the Gazetted Officer or the Magistrate referred to in sub-section (1);

(3) The Gazetted Officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made;

(4) No female shall be searched by anyone excepting a female."

As per that provision mandatory in nature, it is incumbent upon the prosecution to apprise the accused about his right of being searched before a Gazetted Officer or a Magistrate and that such opportunity has to be given. If that opportunity is not given although accused does not say about it to searching agency, it would be fatal to the prosecution. The Supreme Court, while dealing with the point in the case of Saiyed Mohd. Saiyed Umar Saiyad & Ors vs. State of Gujarat, 1995 Supreme Court Cases (Cri) 564, - [1995 (2)] XXXVI (2) GLR 1315 has also clearly held that it is obligatory on the part of the police officer conducting the search to inform the citizen accused of his right to have him searched in the presence of a Gazetted Officer or a Magistrate and the prosecution must prove that the accused was made aware of his right. Failure to inform accordingly is fatal. No presumption can be drawn that the police officer had discharged his duty. If no evidence to this effect is given the Court must assume that the accused was not informed about his right and consequently the court has to hold that the possession of the illicit article was not established. The protection given to the accused under Section 50 of the NDPS Act cannot be disregarded on the technicality namely the point was not raised in the Trial Court or at the time of evidence suggestion on behalf of accused was not made.

4. We perused the evidence on record and more particularly the evidence of searching authority. No where we found a word indicating about the procedure mandated by Sec.50 was followed. The learned Additional Public Prosecutor also failed to point out from record that procedure as per Sec. 50 was followed and there was no breach. In view of the matter and above referred decision of the Supreme Court, the submission made on behalf of the respondent cannot be sustained and the appellant's contention outvies. The result is that the appeal will have to be allowed as the formalities required to be undergone under Section 50 have not been undergone so far as it relates to the conviction and

sentence under Section 18 of the NDPS Act.

5. So far as conviction and sentence under Section 66-A of the Bombay Prohibition Act is concerned, Mr. Munshi failed to point out any thing on record which would justify us in interfering with the findings of the learned Judge below and his judgment and order. Keeping the provisions of Evidence Act and Bombay Prohibition Act in mind, we perused the record and we are satisfied that the conclusions reached by the lower court are not perverse or arbitrary but just and logical consistent with law. In such view of the matter, we maintain the conviction under Section 66-A of the Bombay Prohibition Act. We are of the view that when the learned Judge has not passed the sentence specifically, explicit order is required to be passed. Considering the wrong committed by the appellant and also the provision of the Bombay Prohibition Act, we are of the view that the appellant is required to be sentenced to 3 years rigorous imprisonment and a fine of Rs.10,000/- in default to suffer rigorous imprisonment for one year more because the sentence awarded by the court below if maintained for the offence under Section 66(1)(b) would not sound reasonable, just and adequate as the sentence must be commensurating with the crime.

6. In light of the discussion hereinabove, the appeal is required to be partly allowed. We accordingly allow the appeal partly. The judgment and order of the lower Court convicting and sentencing the appellant of the offence under Section 18 of the Narcotic Drugs and Psychotropic Substances Act, is hereby set aside and the appellant is acquitted of the same. The conviction under Section 66-A of the Bombay Prohibition Act is maintained, but the sentence is reduced to 3 years rigorous imprisonment and fine of Rs.10,000/- in default, rigorous imprisonment of one year more. The appellant by now must have undergone the sentence we have awarded and therefore he be set at liberty forthwith if not required in any other matter.

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